

ORIGINAL



0000082128

RECEIVED

47

BEFORE THE ARIZONA CORPORATION COMMISSION

2008 FEB 22 P 4:18

Arizona Corporation Commission

DOCKETED

FEB 22 2008

DOCKETED BY

nr

MIKE GLEASON

Chairman

WILLIAM MUNDELL

Commissioner

JEFF HATCH-MILLER

Commissioner

KRISTIN MAYES

Commissioner

GARY PIERCE

Commissioner

IN THE MATTER OF QWEST  
CORPORATION'S PETITION FOR  
ARBITRATION AND APPROVAL OF  
AMENDMENT TO INTERCONNECTION  
AGREEMENT WITH ARIZONA  
DIALTONE, INC. PURSUANT TO  
SECTION 252(B) OF THE  
COMMUNICATIONS ACT OF 1934, AS  
AMENDED BY THE  
TELECOMMUNICATIONS ACT OF 1996  
AND APPLICABLE STATE LAWS

T-03608A-07-0693  
DOCKET NO. T-01051B-07-0693

ARIZONA DIALTONE, INC.'S  
OPPOSITION TO QWEST  
CORPORATION'S MOTION FOR AN  
ORDER AWARDING QWEST'S  
REQUESTED RELIEF REGARDING  
THE PROPOSED TRO/TRRO  
AMENDMENT

Pursuant to the Procedural Order dated February 6, 2008, Arizona Dialtone, Inc. ("AZDT") hereby files its Opposition to the Motion for an Order Awarding Qwest's Requested Relief Regarding the Proposed TRO/TRRO Amendment (the "Motion") filed by Qwest Corporation ("Qwest"). This Opposition is supported by the attached Memorandum of Points and Authorities, which is incorporated by reference herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In its Motion, Qwest acknowledges that it is seeking the same relief in this arbitration proceeding as it is contemporaneously seeking in Docket No. T-01051B-07-0693 (hereinafter, the "Complaint proceeding"). Qwest has filed a Motion for Judgment on the Pleadings in the

1 Complaint proceeding in which it make many of the same arguments as are made in the instant  
2 Motion, and on this date, AZDT has filed its Opposition to the Motion for Judgment on the  
3 Pleadings. Accordingly, as the arguments are very similar, AZDT will borrow liberally from its  
4 Opposition to the Motion for Judgment on the Pleadings.

## 5 II. LEGAL ARGUMENT

### 6 A. Standard of Review

7 Although Qwest does not call the instant Motion a motion for judgment on the pleadings, it  
8 clearly is so because Qwest is seeking the relief requested in its Petition for Arbitration on the  
9 basis of the pleadings. Accordingly, the standards for granting a motion for judgment on the  
10 pleadings apply to the instant Motion. Namely, a motion for judgment on the pleadings requires  
11 the court to take into consideration the allegations of both the complaint and the answer, and to  
12 assume the truth of material allegations of both pleadings. Neiderhiser v. Henry's Drive-In, Inc.,  
13 96 Ariz. 305, 308, 394 P.2d 420, 422 (1964). While well-pleaded allegations of fact will be  
14 taken as true, conclusions of law are not admitted for purposes of a motion for judgment on the  
15 pleadings. Shannon v. Butler Homes, Inc., 102 Ariz. 312, 315, 428 P.2d 990, 993 (1967). In  
16 addition, all of the moving party's allegations which have been denied in the answer are taken as  
17 false, such that the motion for judgment on the pleadings may be granted only if the moving party  
18 is clearly entitled to judgment as a matter of law. Food for Health Co., Inc. v. 3839 Joint  
19 Venture, 129 Ariz. 103, 106, 628 P.2d 986, 989 (App. 1981). Accordingly, a motion for  
20 judgment on the pleadings should be granted only if, upon examination of the entire record, it is  
21 determined that there are no disputed issues of fact, which, if true, could affect final judgment.  
22 Brown v. White, 4 Ariz.App. 255, 257, 419 P.2d 385, 387 (App. 1966). Thus, where defendant  
23 properly raises issues of fact in its answer, a motion for judgment on the pleadings by plaintiff  
24 must be denied. Dons Club v. Anderson, 83 Ariz. 94, 98, 317 P.2d, 534, 536 (1957). Finally,  
25 where, as here, matters outside the pleadings are considered, the motion is more properly treated  
26 as a motion for summary judgment rather than a motion for judgment on the pleadings. Crook v.

1 Anderson, 115 Ariz. 402, 403, 565 P.2d 908, 909 (App. 1977). As will be shown below, Qwest  
2 cannot meet the standard for granting either a motion for judgment on the pleadings or a motion  
3 for summary judgment, and therefore, its Motion must be denied as a matter of law.

4 **B. Qwest Misconstrues the Admissions Made By AZDT**

5 Just like Qwest's Motion for Judgment on the Pleadings, the instant Motion is premised on  
6 supposed "admissions" made by AZDT, in this case, admissions supposedly made in AZDT's  
7 Response to Qwest's Petition for Arbitration (the "Petition"). However, a close examination of  
8 what AZDT actually admitted in its Response to the Petition reveals that Qwest has misconstrued  
9 AZDT's admissions. Moreover, AZDT's actual admissions are wholly insufficient to justify  
10 granting the Motion. Accordingly, AZDT begins its legal analysis by refuting the supposed  
11 "admissions" Qwest argues in the Motion.

12 First, Qwest claims that AZDT has admitted that "Arizona Dialtone has refused to accept  
13 the TRRO amendment." (Motion, p.2, lns.20-21). This assertion presumes that AZDT was  
14 required as a matter of law to sign the form of TRRO amendment that Qwest propounded to  
15 AZDT, and that AZDT had no legal right to negotiate the terms of the TRRO amendment or to  
16 refuse to sign a form of amendment with which it did not agree. Nowhere does Qwest provide  
17 this tribunal with any authority for the proposition that AZDT was required by law to sign  
18 Qwest's form of TRRO amendment, as opposed to a negotiated form of TRRO amendment.  
19 Moreover, AZDT is willing to sign an appropriate form of TRRO amendment, but has been  
20 unable to do so due to Qwest's insistence on retrospective application of the TRRO amendment to  
21 require AZDT to pay approximately \$1.3 million dollars for previously provided switching  
22 services. (See Complaint in Docket No. T-01051B-07-0693, ¶11 & Exhibit D).

23 Second, Qwest asserts AZDT has admitted that "Qwest repeatedly requested Arizona  
24 Dialtone to enter into negotiations to implement the TRRO." (Motion, p.3, lns.22-24). The point  
25 of this assertion appears to be that AZDT refused to negotiate regarding the terms of the TRRO,  
26 but that is demonstrably incorrect. As shown by the written testimony of Qwest representative

1 Larry Christensen filed in parallel proceedings between Qwest and AZDT currently pending  
2 before the Colorado Public Utilities Commission: (1) AZDT agreed to amend the terms of the  
3 existing ICA between the parties to include the terms of a TRRO amendment rather than negotiate  
4 an entirely new agreement (Affidavit of Thomas Bade (“Bade Aff.”), attached hereto as Exhibit  
5 A, at ¶7); (2) AZDT did engage in negotiations through its authorized representative (Bade Aff.,  
6 Exhibit A, ¶7); (3) AZDT provided Qwest with a redlined version of Qwest’s form of TRRO  
7 amendment which incorporated AZDT’s requested revisions to Qwest’s form of TRRO  
8 amendment (Bade Aff., Exhibit A, ¶7); and (4) Qwest (not AZDT) stopped negotiations for a full  
9 year while the Covad Litigation was pending, allowed the arbitration window pursuant to a prior  
10 request for negotiations to close, and did not resume negotiations until the decision of the United  
11 State District Court for the District of Arizona in the Covad Litigation had been rendered. (Bade  
12 Aff., Exhibit A, ¶8). Thus, Qwest’s implication that AZDT refused to negotiate, or that the  
13 passage of time without a signed TRRO amendment is due to AZDT’s alleged refusal to negotiate,  
14 is simply incorrect.

15 Third, Qwest argues that AZDT has admitted that it “agrees with Qwest about the impact  
16 and meaning of the TRRO, and the effective dates of the TRRO.” (Motion, p.2, lns.25-26).  
17 Qwest reaches this conclusion from the fact that AZDT admitted the allegations of paragraphs 18  
18 and 19 of Qwest’s Petition. (Motion, p.4, lns.3-4). However, a closer examination of the  
19 allegations contained in paragraphs 18 and 19 of the Petition reveals that AZDT’s admissions of  
20 those allegations are not dispositive of the issues in dispute. In paragraph 18, Qwest simply  
21 alleged that: (1) the TRRO established new rules regarding ILECs’ unbundling obligations; (2) the  
22 TRRO was effective March 11, 2005; (3) pursuant to the TRRO, ILECs no longer have an  
23 obligation to provide mass market local circuit switching on an unbundled basis; and (4) the  
24 TRRO establishes a one-year transition period during which CLECs are entitled to continued  
25 access to local circuit switching on an unbundled basis with respect to their embedded base of  
26 customers. (Petition, ¶18). There is nothing controversial about these allegations, which is why

1 AZDT admitted them. However, these allegations do not address the fundamental issues still in  
2 dispute, i.e., the rates that AZDT is required to pay for the one-year transition period and  
3 thereafter, which means that AZDT's admission does not in any way dictate the outcome in these  
4 proceedings. The fact that AZDT admitted the allegations of paragraph 19 is similarly unhelpful  
5 because in that paragraph Qwest simply quotes language from the implementing regulations to the  
6 effect that CLECs are not entitled to obtain local circuit switching on an unbundled basis for new  
7 customers during the one-year transition period and the requirement is self-implementing.  
8 (Petition, ¶19). Qwest accurately quotes the FCC regulations, which is why these allegations  
9 were admitted. Once again, however, AZDT's admission is not dispositive of the core pricing  
10 issues yet to be resolved.

11 Fourth, Qwest claims that in light of AZDT's admissions, "it has become clear that  
12 Arizona Dialtone no longer objects to the application of the TRRO to the interconnection  
13 agreement between the parties by way of an appropriate amendment." (Motion, p.2, lns.23-25).  
14 That is a correct statement, but it ignores the critical fact that, as explained in detail below, AZDT  
15 continues to contest the pricing provisions that Qwest has built into its form of TRRO amendment.  
16 Thus, the key issue is not whether AZDT is willing to sign a TRRO amendment (it is), but rather  
17 whether the core pricing issues have been resolved (they have not).

18 From these mistaken interpretations of AZDT's Answer, Qwest ultimately concludes that  
19 AZDT has now admitted that its "pre-litigation objections to the TRRO Amendment were simply  
20 wrong." (Motion, p.5, lns.2-3). In fact, while the issues have been narrowed to some degree by  
21 the decision in the Covad Litigation (as AZDT predicted would be the case), the fundamental  
22 issues regarding the rate AZDT is required to pay Qwest for mass market local circuit switching  
23 during the one-year transition period and thereafter, as incorporated in Qwest's form of TRRO  
24 amendment, remain unresolved.

25 **B. The TRRO Language Issues Which Have Been Resolved**

26 The following issues, as numbered in Qwest's Petition, are no longer in dispute:

- 1 • Issue No. 1: “Whether the federal regulatory regime restricts the unbundling
- 2 obligations that may be imposed upon ILECs in interconnection agreements
- 3 arbitrated under Section 252.” (Petition, ¶25).
- 4 • Issue No. 2: “Whether the scope of Qwest’s unbundling obligations should be made
- 5 conditional upon non-specific references to state or federal laws and regulations.”
- 6 (Petition, ¶26).
- 7 • Issue No. 3: “Whether the one-year transition period the TRRO provided for
- 8 access to local circuit switching, including UNE-P services Arizona Dialtone uses
- 9 to serve its embedded base of customers, commenced on the effective date of the
- 10 TRRO and expired on March 10, 2006, and the bar against UNE switching has
- 11 been in place since then,<sup>1</sup> or whether the transition period starts upon the Effective
- 12 Date of the TRRO Amendment.” (Petition, ¶27).
- 13 • Issue No. 5: “Whether in light of the national policy to implement the TRRO
- 14 expeditiously issues raised by either party that were not raised by the Request for
- 15 Negotiations or that do not flow directly from the TRRO should be deferred.”
- 16 (Petition, ¶29).
- 17 • To the extent that Qwest intends Issue No. 5 to refer to the billing
- 18 disputes that AZDT referred to in Paragraph 18(b) of its Response to
- 19 the Petition, which are separate and distinct from the true-up or
- 20 backbilling issues discussed herein, AZDT concedes those issues
- 21 cannot be decided in these proceedings.<sup>2</sup>

22  
23 <sup>1</sup> To the extent that the phrase “and the bar against UNE switching has been in place since [March 10,

24 2006]” is meant to implicate the rate which Qwest is entitled to charge AZDT for local circuit switching services

25 after March 10, 2006, that issue remains in dispute, as set forth below. However, to the extent Qwest intends

26 Issue No. 3 to simply be whether the one-year transition period expired on March 10, 2006 rather than one year

after the parties’ execution of a TRRO amendment, AZDT concedes that issue.

<sup>2</sup> AZDT had hoped to consolidate the Complaint and Arbitration proceedings, and to join the ongoing

billing disputes between the parties in a single forum and proceeding, but now that consolidation has been denied,

1     **C.     AZDT's Position on the Backbilling Issues in Dispute**

2             With respect to Issue No. 4, which the parties agree "concerns the question of backbilling,  
3     or as it was called in the TRRO, a true-up," Qwest takes the position that "[b]ecause Arizona  
4     Dialtone has agreed with Qwest about the legal impact of the TRRO and its implementing  
5     regulations, there no longer can be any debate over whether Arizona Dialtone was obliged by the  
6     TRRO to convert from UNE-P by March 11, 2006, and obliged to pay according to a true-up."  
7     (Motion, p.7, ln.17 – p.8, ln.3). As explained above, that is an incorrect interpretation of  
8     AZDT's Answer. In fact, what remains in dispute is the rate AZDT is required to pay for local  
9     circuit switching from the March 11, 2005 effective date of the TRRO through the present date.  
10    Because the issues are somewhat different for the one-year transition period under the TRRO and  
11    after that one-year transition period, AZDT addresses these two time periods separately below.

12            **1.     The One-Year Transition Period**

13            The TRRO creates a one-year transition period from March 11, 2005 to March 10, 2006  
14    (the "transition period"), and essentially states that the rate to be paid for switching services  
15    during that one-year period is the rate as of June 15, 2004, plus \$1.00 (hereinafter, the "transition  
16    rate"). (TRRO, ¶¶227-28). The TRRO also requires CLECs to convert their existing customers  
17    to alternative service arrangements during the transition period, and further states that CLECs are  
18    not entitled to receive the transition rate for new service orders placed during the transition  
19    period. (TRRO, ¶227). Finally, the TRRO provides for a "true-up" to the transition rate upon  
20    execution of a TRRO amendment. (TRRO, ¶228, n.630).

21            It is undisputed that at all times during the transition year, Qwest billed AZDT for local  
22    circuit switching at the then existing unbundled rate, and that AZDT paid Qwest for local circuit  
23    switching at that rate. (Bade Aff., Exhibit A, at ¶5). In addition, while the TRRO purported to  
24    prohibit placement of new orders for local circuit switching at the unbundled rate, Qwest in fact

25            

---

AZDT accepts that the billing issues will have to be decided in a separate proceeding.  
26

1 encouraged AZDT to continue placing new service orders, knowingly accepted such orders, and  
2 billed those new service orders at the unbundled rate in disregard of the TRRO. (Bade Aff.,  
3 Exhibit A, ¶5).

4 Qwest's position is that through the TRRO and Rule 51.319(d)(2)(iii), "the FCC set the  
5 transition rate exactly," and as a result, "the transition rates are known and should be applied to  
6 the transition period." (Motion, p.9, lns.14-15, 23). On this basis, Qwest seeks to recover the  
7 "plus \$1.00" transition rate for the one-year transition period. However, Qwest ignores the  
8 following language of the TRRO regarding the transition rate, "Of course, the transition  
9 mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers  
10 remain free to negotiate alternative arrangements superceding this transition period." (TRRO,  
11 ¶228) (emphasis added). As more fully explained below, it is AZDT's position that by continuing  
12 to provide AZDT with local circuit switching services at the existing unbundled rate during the  
13 transition period, contrary to its threats to discontinue doing so and with full knowledge that  
14 AZDT objected to the transition rate, and by accepting AZDT's payments for switching services  
15 at the unbundled rate, Qwest effectively entered into "alternative arrangements superceding [the]  
16 transition period" within the meaning of TRRO paragraph 228.

17 In its Motion, Qwest addresses its arguments primarily to AZDT's estoppel and waiver  
18 defenses. Essentially, Qwest claims that: (1) an estoppel defense will not lie because AZDT could  
19 not have justifiably relied on the billing history during the transition year as the basis for  
20 entitlement to switching services at the unbundled rate, and (2) a waiver defense will not lie  
21 because Qwest put AZDT on notice of its intent to back bill AZDT at the transition rate. Qwest  
22 further argues that it had no contractual authority to bill at any rate other than the unbundled rate.  
23 None of these arguments entitle Qwest to judgment at the pleadings stage.

24 First, the essential element of equitable estoppel is conduct inconsistent with a later-adopted  
25 position. Thomas & King, Inc. v. City of Phoenix, 208 Ariz. 203, 210, ¶27, 92 P.3d 429, 436  
26 (App. 2004). In this case, Qwest: (1) continued to provide switching services to AZDT, billed for



1 those services at the existing unbundled rate, and accepting AZDT's payments at that rate for the  
2 entirety of the transition period, despite the fact that AZDT previously had stated that it would not  
3 pay the transition rate, thereby placing Qwest on unequivocal notice that the parties had a  
4 fundamental disagreement on price; and (2) continued to provide switching services at the  
5 unbundled rate even after threatening to discontinue service. (Bade Aff., Exhibit A, at ¶¶5, 9).  
6 As a result, AZDT had a right to justifiably rely that contrary to its initial position, Qwest would  
7 provide services at the unbundled rate, such that Qwest is now estopped from charging the  
8 transition rate. Moreover, because the TRRO characterizes the transition rate/true-up as a  
9 "default process" and authorizes "alternative arrangements" for the transition period (TRRO,  
10 ¶228), AZDT was justified in its belief that the transition rate would not apply. At the very least,  
11 there is an issue of fact sufficient to preclude a judgment on the pleadings regarding whether the  
12 parties through their conduct entered into an "alternative arrangement" for the transition period,  
13 and if so, whether Qwest should be estopped from now collecting the transition rate.

14 Second, Arizona law defines waiver as the voluntary and intentional relinquishment of a  
15 known right. Waugh v. Lennard, 69 Ariz. 214, 223, 211 P.2d 806, 812 (1949). By voluntarily  
16 billing AZDT at the existing unbundled rate and accepting payment at that rate, each of which are  
17 intentional acts, Qwest waived its right to come back later and seek to collect a higher rate.  
18 Moreover, the fact that Qwest purportedly put AZDT on notice of its intent with respect to a true-  
19 up is of no legal significance because Qwest continued providing services and billing for them at  
20 the unbundled rate with full knowledge that AZDT had no intention of paying the transition rate.

21 Third, Qwest's argument that it billed AZDT for switching services during the transition  
22 period at the unbundled rate not because it agreed to that rate, but rather, because it had no  
23 contractual right to do otherwise, is belied by its conduct. At various times, including during the  
24 transition period, Qwest threatened to discontinue services if AZDT did not sign Qwest's form of  
25 TRRO amendment. (Bade Aff., Exhibit A, at ¶9). Notably, on May 23, 2007, Qwest provided  
26 AZDT with just two days notice that as of May 25, 2007, the only orders for switching services it

1 would accept would be for disconnection or conversion to alternative services, with all other  
2 orders treated as orders for resale or Qwest Platform Plus ("QPP"). (Bade Aff., Exhibit A, at  
3 ¶9). At the time Qwest made this abrupt change in its billing for switching services, the parties  
4 had not agreed on the rate AZDT would pay for such services, and AZDT had not signed a TRRO  
5 amendment. In other words, Qwest unilaterally changed the way it billed AZDT for switching  
6 services despite the fact that it lacked the very same contractual authority it now claims was  
7 necessary to bill at the higher resale rate, which fatally undercuts Qwest's current argument that it  
8 had no choice but to bill at the unbundled rate pursuant to the ICA.<sup>3</sup> To the contrary, the fact that  
9 Qwest did not convert its billing practices during the transition period, despite being on notice that  
10 AZDT disputed the transition rate, and instead, continued to bill AZDT at the unbundled rate and  
11 accept AZDT's payments at that rate, further reinforces that the parties agreed to an alternative  
12 rate for the transition period as the TRRO expressly authorized them to do, and that Qwest waived  
13 its right to charge AZDT the transition rate set forth in the TRRO.

14 **2. March 11, 2006 to Date**

15 There is no dispute that the transition period ended on March 10, 2006. Unlike for the  
16 transition period, however, the TRRO does not mandate any specific rate that an ILEC must (or  
17 may) charge a CLEC after the transition period ends, thus leaving that issue completely open for  
18 negotiations between the ILEC and the CLEC.<sup>4</sup> In addition, the TRRO does not answer the  
19

---

20 <sup>3</sup> Moreover, the fact that Qwest unilaterally began billing new accounts at the higher resale rate  
21 conclusively refutes Qwest's claim that "Arizona Dialtone's refusal to enter into a TRRO Amendment left Qwest  
22 in an impossible dilemma ...." (Motion, p.9, lns.5-6). Qwest had multiple options to address the billing  
23 impasse, including discontinuing services or unilaterally billing at the resale rate it insisted was appropriate, but  
24 Qwest instead continued to bill AZDT at the unbundled rate, even for new accounts, all the way until May 2007,  
25 and continues to bill AZDT at the unbundled rate for existing customer accounts to this day. Having failed to  
26 avail itself of obvious options to break the impasse, Qwest cannot now be heard to complain that it was caught in  
"an impossible dilemma."

<sup>4</sup> While the TRRO apparently contemplates that CLECs will convert their embedded base of end user  
customers to an alternative service arrangement within the one-year transition period, it is completely silent on  
what rate can be charged for those customers not converted by the end of the transition period.

1 question of what happens when the ILEC and the CLEC are not able to negotiate a TRRO  
2 amendment within the one-year transition period, as was the case here. In other words, the  
3 TRRO simply does not answer the question of what rate a CLEC must pay for switching services  
4 after the transition period ends, i.e., from March 11, 2006 to date.

5 Nonetheless, Qwest asserts that “[a]fter March 11, 2006, the rate the CLEC was obligated  
6 to pay goes up to the rate Qwest offered for alternative service arrangements ....” (Motion, p.10,  
7 Ins.3-4). In support, Qwest quotes a portion of TRRO paragraph 228, which essentially states  
8 that the “plus \$1.00” transition rate is designed to ensure an orderly transition by mitigating the  
9 rate shock CLECs might experience if TELRIC pricing were immediately eliminated while also  
10 providing a “moderate price increase” for “the limited duration of the transition” to protect the  
11 interests of the ILECs. (TRRO, ¶228 (emphasis added)). Nowhere does paragraph 228 suggest a  
12 rate for the post-transition year period or that a true-up for any period of time beyond the  
13 transition year is appropriate. To the contrary, the underscored language makes clear that the  
14 “moderate price increase” applies for “the limited duration of the transition”, i.e., until March  
15 10, 2006, but not beyond that date. The only logical conclusion is that the TRRO contemplated  
16 that after the transition year ended on March 10, 2006, the rate for local circuit switching would  
17 be dictated by competitive market forces, not by the TRRO or its implementing regulations.

18 Moreover, Qwest’s claim that the TRRO mandates a true-up for the period after March 10,  
19 2006 is directly contradicted by the language of the TRRO, which states, “UNE-P arrangements  
20 no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon  
21 the amendment of the relevant interconnection agreements ....” (TRRO, ¶228, n.630) (emphasis  
22 added). The phrase “applicable transition rate” is a reference to the provision in paragraph 228 of  
23 the TRRO, which states that the transition rate is the higher of: (1) the rate as of June 15, 2004,  
24 plus \$1.00; or (2) the rate established by a state commission between June 16, 2004 and the date  
25 of the TRRO, plus \$1.00. (TRRO, ¶228). Thus, the TRRO specifically ties the true-up process  
26 to the transition rate applicable during the one-year transition period, and does not provide any

1 authority for a true-up process for any period of time subsequent to the transition period.

2 It is AZDT's position that by insisting that the TRRO amendment include language  
3 requiring a true-up to Qwest's resale rate for the post-transition period, despite the fact that the  
4 TRRO does not suggest, let alone require, the true-up process for any period of time other than  
5 the one-year transition period, Qwest is essentially misusing and abusing the TRRO amendment  
6 process to bootstrap a resale rate to which AZDT has not agreed. As noted above, while Qwest  
7 eventually converted orders for new services to the resale rate in May 2007 (thus demonstrating  
8 its ability to unilaterally change the pricing for switching services), at all times prior to that date,  
9 Qwest continued to accept new service orders and bill those accounts at the unbundled rate,  
10 despite being on notice that AZDT did not agree to the resale rate or the QPP rate. (Bade Aff.,  
11 Exhibit A, at ¶10). Thus, it is AZDT's position that Qwest should be bound by its choice to  
12 continue billing at the unbundled rate despite the fact that it could have unilaterally begun billing  
13 at a higher rate as it eventually did in May 2007.

14 In addition, the commercial rate that Qwest proposes as a replacement for the unbundled  
15 rate, and which Qwest insists be written into the TRRO amendment for retrospective application  
16 back to March 11, 2006, is an above market rate in that it is higher than the rate AZDT currently  
17 is paying for identical switching services for its customer serviced by other CLECs. (Bade Aff.,  
18 Exhibit A, at ¶13). Thus, it appears that Qwest is manipulating the TRRO amendment process in  
19 an attempt to obtain from AZDT through a TRRO amendment a rate it cannot obtain from AZDT  
20 in the open market. Moreover, because AZDT is Qwest's only real competitor in the Public  
21 Access Lines ("PAL") product market, if AZDT is forced to exit that market due to an above  
22 market resale rate, Qwest will have virtually no competition, which could cause Qwest to raise its  
23 PAL rates. (Bade Aff., Exhibit A, at ¶14). Finally, AZDT believes that Qwest's resale rate  
24 should be lower, not higher, than the rates AZDT is charged by other CLECs providing switching  
25 services for the simple reason that AZDT is leasing underutilized capacity on Qwest's network.  
26 (Bade Aff., Exhibit A, at ¶15).

1     **D.     AZDT's Position with Respect to a TRRO Amendment**

2             Qwest wants this tribunal to believe that AZDT has flatly refused to sign a TRRO  
3 amendment with the hope of delaying indefinitely the higher prices for switching services arising  
4 from the fact that those services no longer are required to be offered on an unbundled basis.<sup>5</sup> To  
5 the contrary, AZDT has never flatly refused to sign a TRRO amendment as Qwest has asserted in  
6 these proceedings. (Bade Aff., Exhibit A, at ¶16). Rather, AZDT is willing to sign an  
7 appropriate form of TRRO amendment that, with respect to local circuit switching rates, is  
8 prospective only and does not unfairly require AZDT to pay substantial sums of money for prior  
9 periods of time. (Bade Aff., Exhibit A, at ¶16). More specifically, AZDT believes that the  
10 parties' billing history during the transition period and thereafter should control, and that a true-up  
11 for the post-transition period is without any legal authority because the TRRO neither mandates  
12 nor mentions a true-up for any period of time other than the one-year transition period.

13             In recognition of the TRRO's command to convert customers to alternative service  
14 arrangements, AZDT already has migrated roughly 50% of its customers to other CLECs. (Bade  
15 Aff., Exhibit A, at ¶16). In addition, AZDT remains willing to convert its remaining customers  
16 to Qwest's resale rate within 30 days of execution of a TRRO amendment, and would be willing  
17 to have this obligation written into a TRRO amendment, provided that Qwest has the capacity to  
18 accept and process the orders for conversion within this time frame. (Bade Aff., Exhibit A, at  
19 ¶16 ).

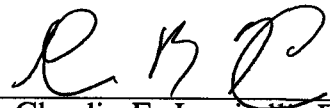
20                             **III.     CONCLUSION**

21             For all the foregoing reasons, AZDT requests that Qwest's Motion for an Order Awarding  
22 Qwest's Requested Relief Regarding the Proposed TRO/TRRO Amendment be denied.

23 \_\_\_\_\_  
24             <sup>5</sup> Qwest also invokes national telecommunications policy to accuse AZDT of "gamesmanship." (Motion,  
25 p.13, ln.21 - p.14, ln.3). With all due respect to the importance of the issues herein, this matter simply involves  
26 a good faith dispute regarding the appropriate rate for local circuit switching in light of the TRRO, and does not  
implicate or threaten national telecommunications policy.

1       **RESPECTFULLY SUBMITTED** this 22 day of February, 2008.

2                                   **CHEIFETZ IANNITELLI MARCOLINI, P.C.**

3  
4                                   By   
5                                   Claudio E. Iannitelli, Esq.  
6                                   Glenn B. Hotchkiss, Esq.  
7                                   Matthew A. Klopp, Esq.  
8                                   Attorneys for Arizona Dialtone, Inc.

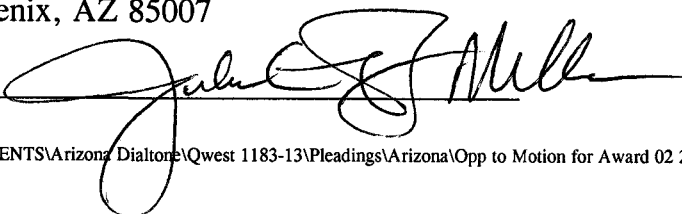
9  
10  
11  
12       **ORIGINAL** and 13 copies of the foregoing  
13       hand-delivered this 22 day of February, 2008, to:

14       Docket Control  
15       **ARIZONA CORPORATION COMMISSION**  
16       1200 West Washington Street  
17       Phoenix, AZ 85007

18       **COPY** of the foregoing transmitted by email  
19       and mailed this 22 day of February, 2008, to:

20       Norman G. Curtright, Esq.  
21       Qwest Corporation  
22       20 East Thomas Road, 16<sup>th</sup> Floor  
23       Phoenix, AZ 85012

24       Maureen A. Scott, Esq.  
25       Legal Division  
26       **ARIZONA CORPORATION COMMISSION**  
      1200 West Washington  
      Phoenix, AZ 85007

By: 

N:\CLIENTS\Arizona Dialtone\Qwest 1183-13\Pleadings\Arizona\Opp to Motion for Award 02 21 08 car.doc

# *Exhibit*      *A*

## 1

2

3

4

5

6.

8

10

12

19

20

21

22

23

24 |

25 |

26



1           6.     In a letter dated March 1, 2006, Qwest invoked the dispute resolution procedures of  
2 the existing ICA and designated Steve Hansen as its authorized representative to negotiate and  
3 resolve the TRRO issues. I was designated as AZDT's authorized representative. In an email to Mr.  
4 Hansen dated June 8, 2006 (a true and correct copy of which is attached hereto as Exhibit 1), I stated  
5 my opinion that certain issues between AZDT and Qwest likely would be resolved by an appeal of  
6 an administrative decision of the Arizona Corporation Commission then pending in the United States  
7 District Court in litigation between Qwest and Covad Communications (the "Covad Litigation").  
8 Therefore, I suggested as an "interim resolution" that the parties agree to continue their then current  
9 arrangement for switching services until the Covad Litigation was resolved, and then reassess their  
10 positions after the District Court issued its decision. In a responsive email dated June 20, 2006 (See  
11 Exhibit 1 hereto), Mr. Hansen stated, "Qwest will not continue to provide Arizona Dialtone with  
12 services under UNE-P until Qwest's matter with Covad is resolved." Notwithstanding Mr. Hansen's  
13 statement that Qwest would not continue to provide AZDT with switching services at the unbundled  
14 rate pending resolution of the Covad Litigation, in fact, Qwest continued to do so for the more than  
15 one full year while the Covad Litigation remained pending.

16           7.     The suggestion that AZDT refused to negotiate with Qwest regarding a TRRO  
17 amendment is incorrect. As stated in the written testimony of Qwest representative Larry  
18 Christensen filed with the Colorado Public Utilities Commission (a true and correct copy of which is  
19 attached hereto as Exhibit 2): (1) AZDT agreed to amend the terms of the existing Interconnection  
20 Agreement ("ICA") between the parties to include the terms of a TRRO amendment rather than  
21 negotiate an entirely new agreement; (2) AZDT did engage in negotiations through its authorized  
22 representative (me); and (3) AZDT provided Qwest with a redlined version of Qwest's form of  
23 TRRO amendment which incorporated AZDT's requested revisions to Qwest's form of TRRO  
24 amendment. (See Testimony of Larry Christensen, Exhibit 2 hereto, at p.4, lns.12-16; p.5, lns.13-17;  
25 p.7, lns.11-15).

26           8.     Mr. Christensen's filed testimony also demonstrates that Qwest: (1) stopped

1 negotiating with AZDT while the Covad Litigation remained pending, (2) allowed the arbitration  
2 window to close without initiating arbitration proceedings under § 252 of the Act, and (3) did not  
3 resume negotiations with AZDT until the United States District Court for the District of Arizona  
4 issued its opinion in the Covad Litigation on July 18, 2007 reversing the administrative decision of  
5 the Arizona Corporation Commission. (See Testimony of Larry Christensen, Exhibit 2 hereto, at  
6 p.8, lns.1-22). As a result, there were no negotiations for the more than one full year between June  
7 2006 and July 2007, and Qwest continued billing AZDT for switching services at the unbundled  
8 rate.

9       9. On various occasions both during the one-year transition period and thereafter, Qwest  
10 threatened to discontinue services if AZDT did not sign Qwest's form of TRRO amendment. For  
11 example, on May 23, 2007, Qwest provided AZDT with just two days notice that as of May 25,  
12 2007, the only UNE-P orders it would accept would be for disconnection or conversion to alternative  
13 services, with all other orders treated as orders for resale or Qwest Platform Plus ("QPP"). A true  
14 and correct copy of Qwest' May 23, 2007 letter to AZDT is attached hereto as Exhibit 3.

15       10. From the beginning, Qwest has adopted a take it or leave style of negotiation. The  
16 key issues in the negotiation of the TRRO amendment – the prices AZDT would be required to pay  
17 for switching services during the transition period and thereafter – were never really subject to  
18 negotiation. With respect to the proposed TRRO amendment, Qwest took the position that AZDT  
19 was required to pay the "plus \$1.00" rate for the transition period, and was required to pay Qwest's  
20 resale rate or its QPP rate thereafter, even though AZDT never agreed to those rates, I had repeatedly  
21 made clear that AZDT would not pay those rates, and even though Qwest had invoiced AZDT, and  
22 AZDT had paid Qwest, for switching services at the existing unbundled rate.

23       11. The first time I realized that Qwest was seeking to collect approximately \$1.7 million  
24 from AZDT for previously provided switching services was when Qwest provided AZDT with  
25 spreadsheets of the amounts it claimed were owed in approximately December 2007. In fact, I  
26 believe that what I received are the spreadsheets attached as exhibits to Qwest's Complaints filed

1 with the Colorado, Arizona and Minnesota Commissions.

2 12. It is AZDT's belief that as a precondition of collecting the transition rate, Qwest was  
3 required to submit a compliance filing with each State commission for approval of the transition rate.  
4 AZDT does not believe Qwest did so in Arizona, Colorado or Minnesota, the three states where  
5 AZDT has an ICA with Qwest.

6 13. The commercial rate that Qwest proposes as a replacement for the UNE-P rate, and  
7 which Qwest proposes be written into the TRRO amendment for retrospective application, is an  
8 above market rate in that it is higher than the rate AZDT is paying for identical services with respect  
9 to that portion of its customers serviced by other CLECs providing switching services.

10 14. AZDT is Qwest's only real competitor in the Public Access Lines ("PAL") product  
11 market, which means that if AZDT is forced to exit that market due to an above market resale rate,  
12 Qwest will have virtually no competition, which could cause Qwest to raise its PAL rates.

13 15. AZDT believes that Qwest's resale rate should be lower, not higher, than the rates  
14 AZDT is charged by other CLECs providing switching services for the simple reason that AZDT is  
15 leasing underutilized capacity on Qwest's network.

16 16. AZDT has never flatly refused to sign a TRRO amendment as Qwest has asserted in  
17 these proceedings. Rather, AZDT is willing to enter into a TRRO amendment that, with respect to  
18 local switching rates, is prospective only and does not compel AZDT to pay substantial sums of  
19 money for prior periods of time. In addition, AZDT already has migrated roughly 50% of its  
20 customers to other CLECs, and with respect to its remaining customers, AZDT has offered to  
21 convert those customers to Qwest's resale rate within 30 days of execution of a TRRO amendment,  
22 and would be willing to have this obligation written into the TRRO amendment, provided that Qwest  
23 has the capacity to accept and process the orders for conversion within this time frame.

24 Further Affiant sayeth naught.  
25  
26

Thomas Bade

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1 ACKNOWLEDGED, SUBSCRIBED AND SWORN TO before me this 21<sup>st</sup> day of  
2 February, 2008, by Thomas Bade.



5 My Commission Expires:

6 7-23-2010

7

8 N:\CLIENTS\Arizona Dialtone\Qwest 1183-13\Pleadings\Arizona\Bade Affidavit 02 21 08 car.doc

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

*Exhibit*      *“1”*

**From:** Hansen, Steve (Wholesale)  
**Sent:** Tuesday, June 20, 2006 12:04 PM  
**To:** 'Tom Bade'  
**Subject:** RE: Tuesday Phone Meeting TRP/TRRO

Tom,

I meant to attach the amendment as well.

Steve

---

**From:** Hansen, Steve (Wholesale)  
**Sent:** Tuesday, June 20, 2006 12:00 PM  
**To:** 'Tom Bade'  
**Subject:** RE: Tuesday Phone Meeting TRP/TRRO

Tom,

I can appreciate your position but Qwest is not willing to handle the issues between our companies as a one off or on an interim basis. Hence is not obligated nor willing to continue to provide UNE-P services. Unfortunately it is now well after the end of the default transition period of March 11, 2006. Arizona Dialtone is still trying to receive UNE pricing on its services with no end in sight. It has become unacceptable. Qwest will not continue to provide Arizona Dialtone with services under UNE-P until Qwest's matter with Covad is resolved.

I must point out that Qwest believes that the Arizona Commission's arbitration order in the Covad matter violates the Telecommunications Act and impermissibly conflicts with federal policy. That is demonstrated by the fact that all 12 of the other state commissions in Qwest's territory that addressed these very same network unbundling issues in Section 252 arbitrations between Qwest and Covad have rejected Covad's network unbundling demands as unlawful. These rulings confirm that state commissions do not have authority in a Section 252 arbitration or under state law to impose network unbundling that the FCC has determined is not required under Section 251.

I must also point out that your reliance on Section 271 of the Act is also misplaced. Section 271 does not grant state commissions any decision-making authority and, specifically, does not authorize state commissions to impose network unbundling obligations or to set prices under that section for network elements. Most important, Qwest is not required to use cost-based rates for elements for which the unbundling obligation arises under Section 271, not Section 251. For these non-impaired elements, Qwest is permitted to charge market-based rates, consistent with the Act's goals of eliminating unnecessary regulation and promoting facilities-based competition. The QPP

rates and the tariff based resale rates Qwest has provided to Arizona Dialtone as replacements for the UNE-P services are just and reasonable rates. I know you feel different but I will assume we must agree to disagree.

Given that we have not moved off of this issue and we are well past the transition period, I will request that the Qwest law department initiate arbitration of the attached TRO/TRRO amendment between Arizona Dialtone and Qwest. I believe this is the only way to move off the issue and have a third party resolve the matter as it is not moving forward despite letters and conversations. Please note that matters not pertaining to the TRO/TRRO should not be included in the resolve of this matter. I am willing to continue to discuss those issues, but they are not pertinent to the TRO/TRRO issue and need to be treated separately.

I understand that you have been in contact with Ken Beck to discuss matters, but I have also had a conversation with Ken that the TRO/TRRO matters should not be discuss with him. I know we are at the crossroads and Qwest must move forward. It is my intent to do so.

I hope this clarifies Qwest's position on the UNE-P once and for all. I am not intending to be obstinate, but I must remain firm on our position.

Regards,

Steve

---

**From:** Tom Bade [mailto:tombade@arizonadialtone.com]  
**Sent:** Thursday, June 08, 2006 12:11 PM  
**To:** Hansen, Steve (Wholesale)  
**Subject:** Tuesday Phone Meeting TRP/TRRO

Dear Steve,

Our phone conversation Tuesday was productive and had many positive elements. I have thought a lot about our conversation and would like to think out loud, if you will, and suggest a possible solution to our dilemma.

While there are obvious differences between Qwest and Arizona Dialtone on the issues of the TRRO impact and the Covad Decision on Section 271 requirements, I believe we now both better understand the other's position.

As you pointed out, the difficulties for Qwest that are presented by the pending litigation against Covad and the Arizona Corporation Commission in Federal Court and the potential for impacting Qwest's relationship with other



CLECs further complicate any resolution of these issues through an Interconnection Agreement compromise.

Although it is always difficult to imagine how any litigation may ultimately be resolved, surely we can both agree that it is likely that the Qwest/Covad litigation may be dispositive of our TRRO/Section 271 UNE disputes. Because similar issues are currently involved in the ongoing Qwest/Covad litigation, I suggest dealing with this issue between Arizona Dialtone and Qwest on an interim basis. As an interim resolution, Qwest and Arizona Dialtone could agree to continue with the current status of services under UNE-P until the Qwest/Covad litigation is resolved, and at that time, both parties can reassess the situation and most likely agree on modified interconnection terms in accordance with whatever the state of the law may be at that time.

Of course, with Arizona Dialtone's emphasis in pay phone lines, Covad and Arizona Dialtone predominately deal with different services. As a result, even after a Covad decision from the courts, there may still be some remaining issues on pricing or provisioning that remain separate and unique and would need to be resolved. But, on the issue of whether the TRRO trumps all or part of the Section 271 checklist UNE requirements, the Covad/Qwest litigation could potentially provide a compelling answer in a relatively efficient and reasonably prompt time.

As I understand from our conversation, by dealing with these issues in an interim dispute resolution manner, instead of as an TRO/TROO Amendment could allow Qwest to avoid the concerns with its other agreements with other CLECs.

Additionally, I appreciate your agreeing to discuss and explore with Ken Beck the issues I raised regarding Qwest's billing operator services, long distance, internet service provider traffic and other services to the CLEC (DUF, Discounts and etc.). As I explained, Arizona Dialtone has agreed that, in return for clearing the outstanding billings, we will stop our refusal to pay these charges in the future. But we continue to believe that Qwest should not be billing these services to the CLEC unless they are ordered, and Arizona Dialtone has never ordered them or in the case ISP traffic should be billed at \$0.00 MOU. Surely you don't truly believe that 0% on finished PAL in Colorado is FCC compliant and reflects the Qwest avoided cost. I believe we can work through the other items, as well, that we marked up.

We are looking forward to your feedback on these issues that we discussed on our phone conversation and I want to continue to address the other issues listed in Part I(2) of our markup of the proposed TRRO Amendment.

Again, I believe we made progress, and I believe we should continue negotiations in the expectations of ultimately reaching a mutually agreeable resolution.

Tom

# *Exhibit* *“2”*

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

**DOCKET NO. 07B-514T**

---

**IN THE MATTER OF QWEST CORPORATION'S PETITION FOR ARBITRATION  
AND APPROVAL OF AMENDMENT TO INTERCONNECTION AGREEMENT WITH  
ARIZONA DIALTONE, INC. PURSUANT TO SECTION 252(B) OF THE  
COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE  
TELECOMMUNICATIONS ACT OF 1996 AND APPLICABLE STATE LAWS**

---

**TESTIMONY OF LARRY CHRISTENSEN**

**ON BEHALF OF**

**QWEST CORPORATION**

**FEBRUARY 5, 2008**

## **TABLE OF CONTENTS**

|             |  |           |
|-------------|--|-----------|
| <b>I.</b>   | <b>IDENTIFICATION OF WITNESS</b>                 | <b>1</b>  |
| <b>II.</b>  | <b>PURPOSE OF TESTIMONY</b>                      | <b>2</b>  |
| <b>III.</b> | <b>TRIENNIAL REVIEW ON REMAND ORDER ("TRRO")</b> | <b>3</b>  |
| <b>IX.</b>  | <b>CONCLUSION</b>                                | <b>10</b> |

**I. IDENTIFICATION OF WITNESS**

**Q. PLEASE STATE YOUR NAME, OCCUPATION AND BUSINESS ADDRESS.**

A. My name is Larry Christensen. I am employed by Qwest Corporation ("Qwest") as a Director – Legal Issues in Wholesale Marketing. My business address is 1801 California Street, Room 2430, Denver, Colorado 80202.

**Q. PLEASE GIVE A BRIEF DESCRIPTION OF YOUR EDUCATIONAL BACKGROUND AND TELEPHONE COMPANY EXPERIENCE.**

A. I graduated from the University of Minnesota with a Bachelor of Electrical Engineering degree in 1969. Over the ensuing years, I have attended numerous college and telecommunications courses.

For more than 38 years, I have worked for Qwest and its predecessors and affiliates, covering my entire career. During that time I have worked in many different departments within the various organizations. I have worked in outside plant and staff engineering positions, marketing staff, product management and product strategy. In my product positions, I was directly involved in the development of interconnection products and strategies that came about as the result of the passage of the Telecommunications Act of 1996 ("Act").

1 Since 2001, I have served as the Director – Legal Issues. In that role, my  
2 responsibilities include supervision of a team of negotiators and support personnel  
3 who are responsible for negotiating and administering wholesale contracts between  
4 Qwest and its wholesale customers, the vast majority of which have been section  
5 252 Interconnection Agreements with competitive local exchange carriers  
6 (“CLECs”). I am also directly involved in negotiations of commercial agreements,  
7 including Qwest Platform Plus (“QPP”) which I discussed with Arizona Dialtone,  
8 and some interconnections agreements.  
9

10 **Q. HAVE YOU TESTIFIED PREVIOUSLY IN COLORADO?**

11 A. Yes. However, that testimony dealt with intrastate private line competition  
12 approximately twenty years ago. I have not testified in Colorado since.  
13

14 **II. PURPOSE OF TESTIMONY**  
15

16 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

17 A. The purpose of my testimony is to provide background on the interconnection and  
18 commercial agreement negotiations process between Arizona Dialtone and Qwest  
19 under section 252 of the Act. I will not be addressing the additional issues that  
20 Arizona Dialtone raised as part of its response to the petition since the parties did  
21 not negotiate those issues and the ALJ ruled in the prehearing conference that the  
22 issues will not be addressed in the arbitration.

1                   **III. TRIENNIAL REVIEW ON REMAND ORDER (“TRRO”)**

2   **Q.   WHEN DID QWEST FIRST NOTIFY ARIZONA DIALTONE OF ITS**  
3       **INTENT TO MODIFY THE PARTIES’ INTERCONNECTION**  
4       **AGREEMENT TO INCLUDE THE TERMS AND CONDITIONS OF THE**  
5       **FCC’S TRIENNIAL REVIEW ON REMAND ORDER (“TRRO”)?**

6   A.   On March 4, 2005, Qwest issued an email communication to all CLECs that have  
7       interconnection agreements with Qwest and that required an interconnection  
8       agreement amendment to reflect the changes in law in their agreements as a result  
9       of the *TRRO* decision. Mr. Thomas Bade was the Arizona Dialtone recipient of that  
10      email. A true and correct copy of Qwest’s March 4, 2005 email is attached hereto  
11      as Exhibit LTC1 to this testimony, and is incorporated by this reference. On March  
12      17, 2005, Mr. Bade and I exchanged emails to clarify a point of the March 4th  
13      notice and to set up a March 29, 2005 call to discuss Qwest’s QPP offer.

14  
15   **Q.   WHAT WAS THE DISCUSSION ABOUT THE QPP SERVICE OFFER?**

16   A.   Mr. Bade had reviewed the QPP offer, but did not believe that the rate that Qwest  
17      was proposing should apply to the PAL (Public Access Line) services that his  
18      company provided. He thought that the rate either should be lower than the  
19      business port rate or that his company should be able to purchase the service at the  
20      residential port rate. Qwest did not agree that his suggestion was appropriate.



1   **Q.   WHEN DID QWEST CONTACT ARIZONA DIALTONE DIRECTLY TO**  
2       **INITIATE NEGOTIATIONS OF THE *TRO/TRRO* AMENDMENT?**

3   A.   On June 17, 2005, Sandy Sanderson of my Qwest interconnection negotiation team  
4       sent Mr. Bade an email that requested the parties replace their existing  
5       interconnection agreement with one that was compliant with the FCC's Triennial  
6       Review Order ("*TRO*") and the *TRRO*. After not receiving any response from Mr.  
7       Bade, Mr. Sanderson called Mr. Bade on July 13, 2005. Mr. Bade indicated that he  
8       did not recollect the initial June 17, 2005 email and thus Qwest resent it to him that  
9       day. A true and correct copy of Qwest's June 17, 2005 email is attached hereto as  
10      Exhibit LTC2 to this testimony, and is incorporated by this reference.

11  
12   **Q.   DID THE PARTIES NEGOTIATE THE ENTIRE REPLACEMENT**  
13       **INTERCONNECTION AGREEMENT?**

14   A.   No. Because Mr. Bade said he was concerned about the time and cost of  
15       negotiating the entire agreement, the parties agreed that they would just amend the  
16       existing agreement to include the terms and conditions of the *TRO/TRRO*.

17  
18   **Q.   DID MR. BADE INDICATE THAT ARIZONA DIALTONE HAD**  
19       **ADDITIONAL CONCERNS ABOUT BILLING ISSUES UNDER THE**  
20       **EXISTING INTERCONNECTION AGREEMENT?**

21   A.   Yes, Mr. Bade indicated that he believed Arizona Dialtone was being improperly  
22       billed for certain long distance and operator services calls, and further indicated that  
23       he wanted to "negotiate" the disputed billing.

1   **Q.   WHAT WAS QWEST'S RESPONSE TO MR. BADE'S CONCERNS?**

2   A.   Qwest's response to Mr. Bade was to explain that the interconnection agreement  
3       negotiation team was not the correct group to address his billing concerns. We  
4       directed him to our billing and service management organizations to address those  
5       issues.

6  
7   **Q.   DID MR. BADE CONTINUE TO DISCUSS HIS BILLING DISPUTES AS**  
8       **PART OF THESE NEGOTIATIONS?**

9   A.   No, he did not do so at that time. Mr. Bade began working with the appropriate  
10       Qwest personnel, and these billing issues were not brought up as part of the  
11       *TRO/TRRO* amendment negotiations for a number of months.

12  
13   **Q.   HOW WOULD YOU CHARACTERIZE THE NEGOTIATIONS OF THE**  
14       ***TRO/TRRO* AMENDMENT?**

15   A.   I would say, based on the negotiations telephone calls I was a participant in and also  
16       the direct feedback I was getting from the Qwest negotiators, that Mr. Bade was a  
17       reluctant participant and that the negotiations went slowly and with little progress.  
18       Qwest representatives explained the impacts of the changes in law and identified  
19       the options that Arizona Dialtone had with respect to transitioning its UNE-P (UNE  
20       Platform) PAL and POTS (Plain Old Telephone Service) lines if Arizona Dialtone  
21       wished to utilize other Qwest service offerings. These options included  
22       transitioning either to the resold PAL and POTS services or to QPP. Mr. Bade,  
23       however, consistently brought up his concerns about the increased prices that

1 Arizona Dialtone would have to pay for either of those services, since he claimed  
2 these prices would significantly impact his company's profit margins. Mr. Bade  
3 was very resistant to rate increases and made many arguments about why Arizona  
4 Dialtone should not have to pay a higher rate. Qwest explained that the resale  
5 discounts had been set by state commissions and that the QPP rate had been  
6 established by Qwest in negotiations with other major CLECs. Thus, Qwest was  
7 not in a position to negotiate a different rate for Arizona Dialtone, especially since  
8 all other CLECs who had UNE-P services had already executed QPP agreements  
9 and Qwest is under nondiscrimination obligations. In fact, there are currently 37  
10 CLECs purchasing more than 67,000 QPP lines in Colorado.

11  
12 **Q. DID ARIZONA DIALTONE ACTUALLY PROVIDE COUNTER**  
13 **LANGUAGE TO THE *TRO/TRRO* AMENDMENT WITH QWEST IN 2005**  
14 **OR EARLY 2006?**

15 A. No, it did not. Qwest asked a number of times for a redlined version of what  
16 language Arizona Dialtone would change, but received no actual language.

17  
18 **Q. DID QWEST INITIATE DISPUTE RESOLUTION WITH ARIZONA**  
19 **DIALTONE FOR ITS FAILURE TO NEGOTIATE?**

20 A. Yes. On March 1, 2006, I sent Mr. Bade a notice that Qwest was initiating dispute  
21 resolution pursuant to the provisions of the Interconnection Agreement. The notice  
22 named Steve Hansen, Vice President – Carrier Relations, as Qwest's representative

1 to negotiate the dispute. A true and correct copy of Qwest's March 1, 2006 letter is  
2 attached hereto as Exhibit LTC3 to this testimony, and is incorporated by this  
3 reference.

4  
5 **Q. WHAT HAPPENED THEN?**

6 A. There were a number of exchanges between counsel for Qwest and counsel for  
7 Arizona Dialtone between March 3, 2006 and May 2, 2006 arguing whether the  
8 dispute resolution process was appropriate and whether Arizona Dialtone was under  
9 any obligation to execute an amendment.

10  
11 **Q. DID ARIZONA DIALTONE EVER PROVIDE THE QWEST CONTRACT**  
12 **NEGOTIATORS WITH A REDLINE OF THE TRO/TRRO AMENDMENT?**

13 A. Yes, it did. On May 18, 2006, as part of the dispute resolution process, Arizona  
14 Dialtone finally provided Qwest with a redlined version of the *TRO/TRRO*  
15 amendment, including the issues that are part of this arbitration.

16  
17 **Q. DID MR. BADE AND MR. HANSEN ATTEMPT TO RESOLVE THE**  
18 **DISPUTED LANGUAGE?**

19 A. Yes, they had two telephone calls attempting to resolve the dispute; the primary call  
20 happening on June 6, 2006. Unfortunately, they were unsuccessful as spelled out in  
21 an exchange of emails provided as Exhibit LTC4. A true and correct copy of the  
22 exchange of emails referenced in this answer is attached hereto as Exhibit LTC4 to  
23 this testimony, and is incorporated by this reference.

1   **Q.   DID THE PARTIES REACH AGREEMENT IN NEGOTIATIONS WITHIN**  
2       **THE WINDOW OF ARBITRATION SET FORTH IN THE ACT?**

3   A.   No, they did not. Negotiations essentially stopped shortly after the Arizona  
4       Corporation Commission ("ACC") issued its order in Decision No. 98840 and after  
5       the dispute resolution initiated by Qwest did not result in an agreement on  
6       amendment language. The ACC decision essentially ruled that the current TELRIC  
7       (Total Element Long Run Incremental Cost) rate was appropriate pricing for  
8       Section 271 elements until a new rate was established by the Commission. Qwest  
9       decided that there was no reason to continue to argue over the amendment issues  
10      since the key change of law impacting Arizona Dialtone was the FCC decision that  
11      Qwest was not required to provide CLECs like Arizona Dialtone the switch port at  
12      TELRIC rates. Qwest allowed the arbitration window as defined in Section 252 of  
13      the Act to close without initiating arbitration action.

14  
15   **Q.   WHAT CAUSED THE NEGOTIATIONS TO START AGAIN?**

16   A.   The U.S. District Court for the District of Arizona in Case No. CV 056-1030 PHX-  
17      ROS reversed the ACC's Decision No. 98840 on July 18, 2007. Qwest  
18      subsequently reopened negotiations via a letter from Qwest counsel Andrew  
19      Creighton to Arizona Dialtone's counsel William Cleaveland on July 20, 2007. A  
20      true and correct copy of Qwest's July 20, 2007 letter to Arizona Dialtone's counsel  
21      Mr. Cleaveland is attached hereto as Exhibit LTC5 to this testimony, and is  
22      incorporated by this reference.

1   **Q.   WERE NEGOTIATIONS SUCCESSFUL BETWEEN THE PARTIES?**

2   A.   No, they were not. The parties' made absolutely no progress in reaching an  
3       agreement on the *TRO/TRRO* amendment issues, which has led Qwest to file this  
4       arbitration action.

5  
6   **Q.   HAS QWEST BEEN CLEAR ABOUT ITS INTENT TO BACK BILL OR**  
7       **"TRUE UP" BACK TO THE EFFECTIVE DATE OF THE *TRRO* ORDER?**

8   A.   Qwest has been very clear in its intent that Arizona Dialtone is obligated to pay,  
9       through a back-billing or "true up" process, amounts back to the *TRRO*'s March 11,  
10      2005 effective date. The initial email notification that Qwest sent to Arizona  
11      Dialtone included the notice about true up billing to the March 11, 2005 effective  
12      date. In addition, the amendment language that Qwest has provided to Arizona  
13      Dialtone has consistently included language about billing true ups to the March 11,  
14      2005 date. Qwest has never agreed to waive the true up with Arizona Dialtone, or  
15      with any other CLEC for that matter.

16  
17   **Q.   WHY IS IT IMPORTANT FOR THE COMMISSION TO CONCUR WITH**  
18       **THE QWEST LANGUAGE FOR TRUE UP BILLING?**

19   A.   It is important for the Commission to adopt Qwest's language for several reasons.  
20       First, the FCC was clear in its *TRRO* order, at paragraph 228 and footnote 630, that  
21       the UNE-P rates were to increase one dollar for the one-year transition interval  
22       ending March 10, 2006 and that true up billing was appropriate in these  
23       circumstances. Qwest should be allowed to bill Arizona Dialtone its lowest cost

1 service alternative subsequent to March 10, 2006. That is the date the FCC ordered  
2 all transitions to alternative services to be completed. Secondly, the Commission  
3 should establish the precedent and policy that does not allow either party to obtain a  
4 financial gain by delaying the execution of changes in law. If the Commission were  
5 to rule in favor of Arizona Dialtone on this true up issue, it would establish an  
6 improper incentive for parties who have a financial disadvantage from a change of  
7 law to delay executing amendments to reflect such changes in law, whether a CLEC  
8 or Qwest. Such a ruling would be bad policy, would encourage gamesmanship and  
9 delay, and would lead to additional disputes and arbitrations.

10  
11 **IX. CONCLUSION**

12 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

13 **A. Yes.**

*Exhibit* “3”





Larry Christensen  
Director – Interconnection Agreements  
1801 California Street, Room 2430  
Denver, CO 80202  
303-896-4686  
larry.christensen@qwest.com

VIA EMAIL & OVERNIGHT MAIL

May 23, 2007

Tom Bade  
President - Arizona Dial Tone  
7170 W Oakland Street  
Chandler, AZ 85226  
480-705-9461  
[tombade@arizonadialtone.com](mailto:tombade@arizonadialtone.com)

Mr. Bade:

This notice is to advise Arizona Dial Tone that any orders it places for new local switching as an unbundled network element ("UNE") under its interconnection agreements with Qwest will be rejected beginning Friday, May 25, 2007. Federal Communications Commission ("FCC") Rule 51.319(d)(2)(iii) provides: "Requesting carriers may not obtain new local switching as an unbundled network element." That rule was self-executing as of March 11, 2005 under the Triennial Review Remand Order ("TRRO"). The only Local Service Requests ("LSRs") Qwest will accept from Arizona Dial Tone for its UNE Platform ("UNE-P") services are for disconnection or conversion to alternative services. All other LSRs would be orders for new local switching as a UNE. Please note that Arizona Dial Tone may order Resale services or enter into the Qwest Platform Plus™ (QPP™) agreement for alternative service arrangements.

Despite repeated good faith attempts by Qwest, Arizona Dial Tone is the *only* CLEC in Qwest's territory that has refused to transition its UNE-P services in accordance with the Triennial Review Order ("TRO") and TRRO changes in law. Qwest again encourages Arizona Dial Tone to contact us to bring your interconnection agreement into compliance with the changes in law.

Qwest reminds Arizona Dial Tone that retroactive billing will apply to all Arizona Dial Tone UNE-P lines that were in service after March 11, 2005. The retroactive billing will include the FCC's \$1.00/port mandated transition period rate increase from March 11, 2005 through March 10, 2006. It will also include rate differences, beginning March 10, 2006, between UNE-P service and any Qwest alternative service to which Arizona Dial Tone transitions. Arizona Dial Tone's liability for this retroactive billing continues to grow.

Sincerely,

Larry Christensen